No. 14-990

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA
Petitioners,

v.

BOBBIE S. MACK AND LINDA H. LAMONE,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes and Rules

REPLY BRIEF FOR PETITIONERS

Respondents do not deny that the Fourth Circuit's holding in *Duckworth* conflicts with both this Court's precedents and the binding decisions of every other court of appeals to confront the issue. Respondents likewise do not dispute that proper resolution of the question presented is a matter of enormous practical significance—not only because it recurs frequently, but also because the cases in which it arises involve issues of special importance. In fact, respondents' brief says almost nothing at all to refute the many arguments that both we and *amicus curiae* Judicial Watch made in support of further review.

What little respondents do say is unpersuasive. Curiously, they dedicate nearly half of their opposition brief to describing (at 2-6) and responding (at 11-14) to several constitutional claims that we expressly declined to raise in the petition. See Pet. 9 n.2. Beyond that, respondents say only that this case is an inappropriate vehicle for resolving the question presented because the First Amendment claim is frivolous and was filed late. Opp. 14-16. But those assertions do not withstand the slightest scrutiny. Review is therefore warranted.

A. The opposition responds, in the main, to issues not presented in the petition

The only claim presently before this Court is petitioners' First Amendment claim, which is the sole claim that the single-judge district court dismissed on the merits under the traditional Rule 12(b)(6) framework. In noting that the district court dismissed other of petitioners' claims as non-justiciable, we stated expressly that "the court's justiciability hold-

ing [is] not subject to challenge here." Pet. 9 n.2. Respondents' nearly singular focus on those other claims (Opp. 2-6, 11-14) is simply off-target.

Respondents also seem to imply that review is unwarranted because this Court already approved the constitutionality of Maryland's redistricting map with its summary affirmance in *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). See Opp. 1, 14. That is similarly wide of the mark. The plaintiffs in *Fletcher* did not bring a First Amendment claim. See *Fletcher*, 831 F. Supp. 2d at 892. Their jurisdictional statement before this Court, in particular, presented a one-person-one-vote challenge concerning incarcerated voters. See Juris. Statement at i, *Fletcher* v. *Lamone* (No. 11-1178). And the district court below properly rejected respondents' res judicata argument. Pet. App. 9a-12a. There is therefore no reason to think that the summary affirmance in *Fletcher* presents an obstacle to further review in this case.

B. This case cleanly presents an important question that has divided the lower courts

1. Respondents do not deny that the question presented here—whether a single judge's conclusion that a complaint fails to state a claim under Rule 12(b)(6) is a sufficient ground for that judge to hold that "three judges are not required" within the meaning of 28 U.S.C. § 2284(b)(1)—has divided the circuits. Nor could they. In square conflict with the D.C., Fifth, and Seventh Circuits (and in substantial tension with the Second and Third Circuits), the Fourth Circuit held that, when a single judge unilaterally concludes that a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge

court." *Duckworth* v. *State Admin. Bd. of Elec. Laws*, 332 F.3d 769, 772-773 (4th Cir. 2003).

Respondents also offer no reason to doubt that the Fourth Circuit's answer to that question was dispositive of petitioners' First Amendment claim. Again, nor could they. Respondents—invoking both *Duckworth* and the plausibility standard described in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—argued before the district court that three judges were not required with respect to petitioners' First Amendment claim because the claim is not "plausible" and thus should be dismissed under Rule 12(b)(6). See Mem. in Support of Defs' Opp. to Pls' Request for Three-Judge Panel and Mot. to Dismiss 4, 24-25 (Dkt. 13-2).

The single-judge district court agreed. Pet. App. 20a-21a. It thus dismissed the First Amendment claim without referring the matter to a three-judge court—not because it deemed the claim "obviously frivolous" or "obviously without merit" in light of the previous decisions of *this* Court (*Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)), but because it determined that "[p]laintiffs' claim under the First Amendment is not one for which relief can be granted" in light of decades-old precedents of the District of Maryland and the Fourth Circuit. Pet. App. 20a-21a.

There is thus no disputing that the dismissal of petitioners' First Amendment claim turned entirely on the Fourth Circuit's conflation in *Duckworth* of the constitutional substantiality standard with the Rule 12(b)(6) plausibility standard.

2. Respondents nevertheless insist (Opp. 9) that this is a "poor vehicle" for addressing the question presented "because the petitioners' claims are insubstantial" and bound to be dismissed "irrespective of

how the Court might answer the question" presented in the petition.

We note, as an initial matter, that the Court (if it prefers) need not reach the issue of whether petitioners' First Amendment claim is a substantial one, since it arises subsequent to the Section 2284 question presented in the petition. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (remanding for the district court to decide all subsequent questions in the first instance).

Regardless, the issue is easily resolved in petitioners' favor. As we explained in the petition (at 27-28), Justice Kennedy's controlling opinion in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), confirms that citizens have a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "participation in the electoral process," their "voting history," their "association with a political party," or their "expression of political views." *Id.* at 314 (citing *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality) and *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)). Thus, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Ibid.* (Kennedy, J., concurring in the judgment).[1]

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[1] Respondents do not dispute that Justice Kennedy's opinion is controlling under *Marks* v. *United State*s, 430 U.S. 188 (1977). The lower courts agree. See, *e.g.*, *Alperin* v. *Vatican Bank*, 410 F.3d 532, 552 n.13 (9th Cir. 2005); *Perez* v. *Perry*, 26 F. Supp. 3d 612, 623 n.6 (W.D. Tex. 2014); *Ala. Leg. Black Caucus* v. *Alabama*, 988 F.Supp.2d 1285, 1295 (M.D. Ala. 2013).

We also pointed to this Court's ballot-access cases (Pet. 28-29), which have held that "[a] burden that falls unequally on [particular] political parties * * * impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 (1983). Thus, it is a violation of "First Amendment interests in ensuring freedom of association" for the State to "impose burdens on new or small political parties" in a way that, in effect, penalizes individuals' "association with particular political parties." *Clements* v. *Fashing*, 457 U.S. 957, 964-965 (1982).

Even absent the liberal construction to which it is entitled, petitioners' *pro se* amended complaint plainly states a viable First Amendment claim based on those theories. It describes how Maryland's redistricting map, by design, split geographic regions with "similarity of political views," thereby "marginaliz-[ing]" the votes of those regions' residents on the basis of their past political affiliations and voting histories. Opp. App. 43 ¶ 22. And it alleges that the resulting "abridgement [of representational rights] most particularly impacts only areas with highly Republican voting history" and thus "constitutes violation of the First Amendment's protection of political association." Opp. App. 44 ¶ 23.

Against this backdrop, it would blink reality to say that the "unsoundness" of petitioners' First Amendment claim (assuming, contrary to fact, that it is unsound *at all*) "so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby*, 409 U.S. at 518.

3. Respondents do not directly respond to any of this. Instead—relying on a summary affirmance that predates *Vieth* by more than a decade—they appear to suggest (Opp. 14) that *Anne Arundel County Republican Central Committee* v. *State Administrative Board of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), aff'ed 504 U.S. 938 (1992), is a prior decision of this Court that inescapably renders petitioners' First Amendment claim frivolous.

That is wrong in two separate respects. To begin with, it is well settled that summary affirmances do not have the same weight under *stare decisis* "as do decisions rendered after plenary consideration." *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 500 (1981). Respondents accordingly acknowledge (Opp. 14) that summary dispositions are "not binding on this Court." Thus, to the extent that the summary affirmance in *Anne Arundel* is inconsistent with *Vieth*, it is *Vieth*—the later decision, rendered after full briefing and argument—that controls.

In any event, *Anne Arundel* is not adverse precedent here. That is because "'[a]n unexplicated summary affirmance settles the issues [only] for the parties'" and cannot be understood as an adoption or renunciation of any broader legal principles. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (quoting *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (Burger, C.J., concurring)). Whatever limited precedential effect a summary affirmance may have, therefore, it "extend[s] no further than 'the precise issues presented and necessarily decided by [this Court in] those actions.'" *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182 (1979) (quoting *Mandel*, 432 U.S. at 176).

That being so, even the Fourth Circuit has recognized the precedential limits of *Anne Arundel*, holding in *Duckworth* itself that, when a district court is "presented with new allegations" concerning "a *different* apportionment plan," the prior decision in *Anne Arundel* cannot "foreclose[]" relief. 332 F.3d at 773. That same reasoning applies here—particularly because it is unclear whether the plaintiffs' First Amendment claim (which was dismissed by the district court in a mere three sentences (781 F. Supp. at 401)) was even pressed before this Court in the jurisdictional statement in *Anne Arundel*.

In explaining that "constitutional claims will not lightly be found insubstantial for purposes of 2281" this Court has admonished that "prior decisions are not sufficient to support a conclusion that certain claims are insubstantial unless those prior decisions 'inescapably render the claims frivolous.'" *Washington* v. *Confederated Tribes*, 447 U.S. 134, 147-148 (1980) (quoting *Goosby*, 409 U.S., at 518). Both on its own terms and in light of *Vieth*, the summary affirmance in *Anne Arundel* does not come close to meeting that exacting standard with respect to petitioners' First Amendment claim.[2]

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[2] The Fourth Circuit's and District of Maryland's respective decisions in *Washington* v. *Finlay*, 664 F.2d 913 (4th Cir. 1981), or *Duckworth* v. *State Board of Elections*, 213 F. Supp. 2d 543 (D. Md. 2002), are equally unhelpful to respondents because those cases are not "previous decisions of this court" (*Goosby*, 409 U.S. at 518) and likewise predate *Vieth*.

C. Concern for avoiding delay in cases like this one weighs in favor of granting immediate review

Respondent finally asserts (Opp. 14) that injunctive relief will be unavailable, and that the "policies underlying the three-judge district court statute would be ill-served by granting further review," because the complaint was filed two years after enactment of Maryland's redistricting plan. But concern for avoiding delay in the disposition of cases like this one counsels strongly in favor of *granting* the petition, not the other way around.

1. Respondents say (Opp. 15-16) that injunctive relief will be unavailable regardless of this Court's intervention because petitioners were "dilatory," filing their complaint two years after Maryland enacted its congressional redistricting plan.

That is no basis for denying review. To begin with, the propriety of injunctive relief is an issue that must be decided by a three-judge district court in the first instance. See *Holland* v. *Florida*, 560 U.S. 631, 653-654 (2010) ("recogniz[ing] the prudence, when faced with an 'equitable, often fact-intensive' inquiry, of allowing the lower courts 'to undertake it in the first instance'") (quoting *Gonzalez* v. *Crosby*, 545 U.S. 524, 540 (2005) (Stevens, J., dissenting)).

Setting that aside, petitioners here were hardly dilatory. At the time the complaint was filed, four congressional elections remained to be held under the challenged reapportionment scheme, in 2014, 2016, 2018, and 2020. Even now, three of those elections have yet to take place. Courts have not hesitated to grant permanent injunctions under similar circumstances. In *Johnson* v. *Miller*, 864 F. Supp.

1354 (S.D. Ga. 1994), for example, the court entered a permanent injunction requiring Georgia to "reconfigure" its 1991 reapportionment map (*id.* at 1393), even though the complaint in that case was filed on January 13, 1994, after an election already had been "held under the new congressional redistricting plan on November 4, 1992." *Id.* at 1369. Those are the precise same circumstances as here. And this Court noted probable jurisdiction in that case and affirmed. *Miller* v. *Johnson*, 515 U.S. 900 (1995).

In *Simkins* v. *Gressette*, 631 F.2d 287 (4th Cir. 1980), *Maryland Citizens* v. *Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970), and *MacGovern* v. *Connolly*, 637 F. Supp. 111 (D. Mass. 1986), by contrast, each of the complaints was filed a decade or longer after the relevant census, with no further elections to take place under the challenged reapportionment schemes. That does not describe this case in the least.[3]

2. Respondents also say (Opp. 14-16) that further review will disserve the purpose of Section 2284's streamlined procedures. In fact, it is the lower courts' application of *Duckworth* that has undermined (and, without this Court's intervention, will continue to undermine) the policies underlying Section 2284. See Pet. 22-24; Br. of Judicial Watch 8-9 (explaining how "[t]he inefficiencies of the Fourth Circuit's rule are not limited to cases in which referral is denied").

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[3] Moreover, there was good reason for the modest delay before the filing of the complaint in this case: A referendum to veto the reapportionment was held on November 6, 2012, and litigation was ongoing in *Fletcher* until June 25, 2012. Had either of those efforts succeeded in invalidating the redistricting map, this lawsuit would not have been necessary.

Here, the complaint was filed on November 5, 2013. If it had been referred to a three-judge district court, as we argue it should have been, a final judgment on the merits would have been entered long ago, and any appeal to this Court already would have been briefed, and perhaps also decided.

But because the complaint was dismissed by a single-judge district court under *Duckworth*, the court of appeals was interposed in the appellate process. That added a seven-month delay—fairly short by modern standards. And because the sole issue that the Fourth Circuit had jurisdiction to decide was whether the case was properly dismissed without convening a three-judge court, a reversal would have required a remand to the district court for a decision on the merits in the first instance. As it is, the Fourth Circuit affirmed, resulting in a certiorari petition, which is likewise limited to the three-judge-court question, and not the merits.

The result, assuming this Court now intervenes, will be greater than a two-year delay before this case is finally referred to a three-judge court, as it should have been from the start. And make no mistake, the fault for that delay—which is certain to be repeated in every other case that poses before this Court the question presented in the petition—lies squarely with the Fourth Circuit and *Duckworth*, not with petitioners. To avoid such delay in future cases, and for all the other reasons given above and in the petition, immediate review is in order.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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